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No. 80-107

In the Supreme Court of the United States

OCTOBER TERM, 1979

THE MENOMINEE TRIBE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the record supports the determination of the Court of Claims that petitioners' claim respecting the Tribe's loss of its tax exemption was barred by the statute of limitations.

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OPINIONS BELOW

The order of the Court of Claims granting the government's motion for summary judgment (Pet. App. 1a-6a) and its order denying petitioners' motion for rehearing (Pet. App. 7a-8a) are unreported.

JURISDICTION

The judgment of the Court of Claims was entered on March 21, 1980. A petition for rehearing was denied on April 25, 1980. The petition for a writ of certiorari was filed on July 24, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

STATEMENT

In 1954, Congress enacted the Menominee Termination Act, ch. 303, 68 Stat. 250 (Pet. App. 9a-16a), which provided for termination of federal supervision over the petitioner Menominee Tribe, pursuant to a specified schedule and set of procedures. Federal supervision was effectively terminated on April 30, 1961, through a proclamation issued by the Secretary of the Interior. 26 Fed. Reg. 3726 (1961). By that time, all assets and property held in trust by the United States for the Tribe had been conveyed to petitioners free of any trust responsibility of the United States. Section 9 of the Termination Act, as amended in 1960, 25 U.S.C. (1964 ed.) 898, provided that after those conveyances had been made, the transferred assets and property, together with income derived from them, would be "subject to * * * taxes, State and Federal, as in the case of non-Indians * * *."

On April 25, 1967, petitioners filed an original petition in the Court of Claims alleging nine specific claims for damages against the United States (Pet. App. 17a-30a). Those claims were designated as follows (*id.* at 21a-29a):

Forest Restrictions; Forest Management; Mill Management; Highway Rights-of-Way; Power Line Right of Way; Public Sewerage System; Soo Line Right of Way; Termination Expenses; and Mismanagement of Tribal Funds and Property. A few of the claims attacked particular provisions of the Termination Act (*e.g.*, Para. 13, "Termination Expenses" (Pet. App. 25a-26a)), while others related to allegedly negligent or otherwise tortious acts of government agents both before and during the termination period.

On March 18, 1970, petitioners filed a pretrial statement in which they mentioned, for the first time, the subject claim for loss of the Tribe's tax exemption. That claim, together with others, was tried in 1971 (Pet. App. 3a, 35a-36a; Pet. 7). No judgment was then entered, however; and in 1973 the trial judge, on petitioners' motion, severed the specific claims into separate dockets, one of them being Docket No. 134-67F, Loss of Tax Exemption (Pet. App. 42a; Pet. 7). No judgment on the merits of the tax exemption claim has ever been entered.

On February 20, 1975, petitioners filed an amended and severed petition incorporating the loss of tax exemption claim, and the government responded with, *inter alia*, a statute of limitations defense, under 28 U.S.C. 2501, which provides that a claim within the jurisdiction of the Court of Claims must be filed within six years after the claim accrues (Pet. App. 2a).

The Court of Claims granted the government's motion for summary judgment on that defense and dismissed the amended petition as to the loss of tax exemption claim. The court observed that it was undisputed that the Termination Act ending federal supervision of the Menominee Tribe became effective on April 30, 1961, and that this was the date on which any claim for the loss of

the Tribe's tax exemption would have accrued (Pet. App. 3a). The court concluded that the original petition, filed five days before the six-year period expired, did not encompass the tax exemption claim, since that claim was not included within the list of nine specific claims and there was no general clause that might cover it (Pet. App. 3a-5a). Reliance on Rule 39(c) of the Rules of the Court of Claims permitting amendments of pleadings on a relation-back theory would not aid petitioners, the court noted, because that would require "some reference in the original pleading, however hazy, to the conduct later complained of" (Pet. App. 5a), and the court found no reference either to the loss of the tax exemption or to Section 9 of the Termination Act by which the exemption was eliminated (*ibid.*).

ARGUMENT

The decision of the Court of Claims represents the application of settled law to the facts of this case. Accordingly it does not warrant review by this Court.

Petitioners do not dispute the Court of Claims' holding that their claim respecting loss of the Tribe's tax exemption would be barred if not filed within six years of April 30, 1961, when the Menominee Termination Act became effective. Rather they contend (Pet. 9-11) that the claim was sufficiently implicated in their timely filed 1967 petition to require a determination that the specific statement of the claim in their 1975 amended petition relates back to the 1967 petition pursuant to Rule 39(c) of the Rules of the Court of Claims. They further argue (Pet. 11-16) that decisions of this Court and other courts conflict with the Court of Claims' holding that, given the substance of the 1967 petition, the 1975 tax exemption claim does not relate back to it and hence is barred by 28 U.S.C. 2501.

Petitioners (Pet. 10 n.15) correctly state that Rule 39(c) of the Rules of the Court of Claims is a counterpart of Rule 15(c) of the Federal Rules of Civil Procedure with regard to the relation-back doctrine and that the Court of Claims construes its rule in harmony with judicial constructions of Rule 15(c). *Vann* v. *United States*, 420 F. 2d 968, 974 (Ct. Cl. 1970). Rule 39(c) and, in pertinent part, Rule 15(c), provide: "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading." Only three of the cases on which petitioners rely involve either rule. All three construe Rule 15(c) as setting forth a fair notice standard. *Tiller* v. *Atlantic Coast Line*, 323 U.S. 574, 581 (1945); *Williams* v. *United States*, 405 F. 2d 234, 236 (5th Cir. 1968); *United States* v. *Johnson*, 288 F. 2d 40, 42 (5th Cir. 1961); and see 3 *Moore's Federal Practice* para. 15.15[3] (2d ed. 1979).

The Court of Claims in essence applied that standard in this case. Thus it looked to see whether the 1967 petition could fairly be read either as implicitly raising the tax exemption claim or as presenting the enactment of the Termination Act as the root of its claims—*i.e.*, the essential "occurrence" underlying the petition. The court, finding that the petition did neither, explained (Pet. App. 4a-5a):

> The original petition appears to set forth nine claims with no nexus except the identity of the plaintiffs and defendant. There was no common legal theory: claims might be proven as breach of trust or taking or negligence. Under some claims the major culprit was the Termination Act. Under others, it was negligence or mismanagement prior to the Act, impairing, perhaps, the value of the tribal property as

> turned over to tribal control on April 30, 1961. There is thus no grouping of claims that might be read as including claims not mentioned on some kind of *noscitur a sociis* theory. There is nothing that can fairly be read as a basket clause. The pleader does not seem to have entertained the idea that came into the case later, that every loss the Menominees suffered after 1961 might be imputed to breach of trust in enactment of the Termination Act.
>
> * * * * *
>
> [S]ection 9 of the Termination Act, the specific grievance of the 1975 amended petition, is never mentioned in the original petition. None of the grievances mentioned in the original petition apparently rise out of Section 9 * * *.

The court also answered petitioners' argument, made also in this Court (Pet. 10-11), that the government's failure to object to the claim soon after it first made its appearance (in petitioners' 1970 pretrial statement) proved that the original petition gave adequate notice. The Court of Claims properly observed (Pet. App. 5a) that a court must still look to the language of the original pleading to see "if the petition embodied any ambiguous language that could arguably have been meant to include that claim." That the government was tardy in raising its statute of limitations defense in no way proves that it was on notice in 1967 that the tax exemption claim was within the compass of the petition.

Finally, referring to the court's order denying rehearing (Pet. App. 7a-8a), petitioners inaccurately state (Pet. 10) that "[t]he Court of Claims in the instant case dismissed [petitioners'] claim out of an apparent belief that application of the relation-back doctrine would be an impermissible use of a court rule to enlarge the court's

jurisdiction to include a claim otherwise excluded by the provisions of 28 U.S.C. § 2501." The court did no such thing. In its order denying rehearing, the court commented (Pet. App. 8a) on an additional argument made by petitioners that was predicated, not on the rule incorporating the relation-back doctrine, but on Rule 39(b) of the Rules of the Court of Claims, which permits amendments of pleadings to conform to evidence introduced at trial without objection. The court correctly held (Pet. App. 8a) that even assuming there was a "trial" respecting the tax exemption claim within the meaning of Rule 39(b), application of the rule could not save the claim from the statutory time bar, since such a rule may not be used to enlarge the court's jurisdiction beyond the bounds prescribed by Congress in 28 U.S.C. 2501. The court thereby recognized a significant distinction between Rule 39(b) and Rule 39(c). Proper application of the relation-back doctrine only permits litigation of a claim that was implicitly included in a timely filed pleading; it thus does not contravene the purpose of a limitations provision. *USM Corp.* v. *GKN Fasteners Limited*, 578 F. 2d 21, 22 (1st Cir. 1978). But to allow new claims to be added by conforming pleadings to evidence would be to allow waiver of the limitations provision by agreement or default of government counsel. Because the limitations provision here is jurisdictional—a condition on the agreement of the sovereign to be sued—this would be clearly impermissible. *Finn* v. *United States*, 123 U.S. 227 (1887); *H-10 Water-Taxi Company Ltd* v. *United States*, 379 F. 2d 963, 964 (9th Cir. 1967).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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